

**Green, LindaE**

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**From:** Chris Horner <Christopher.Horner@cei.org>  
**Sent:** Wednesday, October 08, 2014 11:26 AM  
**To:** FOIA HQ  
**Subject:** Request under the Freedom of Information Act -- Certain Agency Records re: EPA "RTP"  
**Attachments:** CEI FOIA EPA Samenow UPS to Schmidt RTP author and reviewer email.pdf

Please see the attached. Do not hesitate to contact me with any questions.

Best,  
Chris Horner  
202.262.4458



## REQUEST UNDER THE FREEDOM OF INFORMATION ACT

October 8, 2014

U.S. Environmental Protection Agency  
Records, FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, D.C. 20460  
Email: [hq.foia@epa.gov](mailto:hq.foia@epa.gov)

### **Re: Request for Certain Agency Records re: EPA “RTP”**

To EPA’s National Freedom of Information Officer,

On behalf of the Competitive Enterprise Institute (CEI), please provide copies of the following records pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*, within twenty working days<sup>1</sup>:

- 1) all documents sent on June 8 or 9, 2010 by or from Jason Samenow and/or his administrative assistant and/or office (Samenow is formerly of EPA’s Climate Change Division), to NASA Goddard Institute for Space Studies and/or Center for Climate Systems Research, Columbia University in New York<sup>2</sup>; also,

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<sup>1</sup> See *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013), and discussion, *infra*.

<sup>2</sup> **Email provided us by EPA in response to FOIA 2014-010530 assert that this document was sent by UPS overnight to Gavin Schmidt at NASA Goddard Institute for Space Studies, and Center for Climate Systems Research, Columbia University, 2880 Broadway, New York, NY, 10025 USA.**

2) any emails as described below that were *sent to or from certain EPA personnel* involved in producing EPA's July, 2010 Denial of Petitions for Reconsideration, Response to Petitioners, Volume 1: Climate Science and Data Issues Raised by Petitioners (or "RTP", regarding its Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act), *to or from authors of the RTP, and/or to non-EPA personnel serving as reviewers*, whether they are on the correspondence in the To:, From:, cc:, and/or bcc: field, dated *over the seven-month period February 1, 2010 through August 31, 2010, inclusive*. These EPA personnel include Samenow, Deb Berlin, Rona Birnbaum, Erin Birgfeld, Benjamin DeAngelo, Andrea Drinkard, John Hannon, Lesley Jantarasami, Dina Kruger, Cathy Milbourn, John Millett, Kevin Rosseel.

CEI is a non-profit 501(c)3 public policy institute with research, investigative journalism and publication functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources, all of which include broad dissemination of public information obtained under open records and freedom of information laws.

### **Background to this Request**

The background to this request is largely framed in a recent post by statistician Stephen McIntyre at his widely read blog Climate Audit, "Who Wrote EPA's 'Myths vs Facts'?"<sup>3</sup>. This draws attention to questions, key to the public debate over EPA's various proposed regulations to regulate power plants flowing in full or in part from EPA's Endangerment

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<sup>3</sup> <http://climateaudit.org/2014/08/31/who-wrote-epas-myths-vs-facts/#more-19621>

finding. As McIntyre notes, *inter alia*, “The identity of the authors (and reviewers, if any) is not disclosed in the supporting documents (RTP documents) for the denial decision.” The provenance of this document is of public interest due to its importance, and reasonable questions regarding its compliance with federal data-quality requirements.

As McIntyre also writes (emphases in original):

“In an earlier post, I had speculated that these documents had been prepared by the EPA communications office. This speculation has proved correct. The Myths vs Facts document was authored by non-specialists in the EPA communications [office]. Neither it nor the other ‘Resources’ appear to have been externally peer reviewed... The first draft was prepared on July 20, 2010, less than 10 days prior to the rollout of the Denial Decision. During this week (and even on rollout morning), comments and changes to the RTP documents were still being made. The FOIA documents thus far provided show that the Myths vs Facts document was distributed for comment to EPA communications specialists and EPA general counsel, but none of these documents show whether responses were received...

### **EPA Policies**

[EPA Guidelines](#) require that EPA carry out external peer review for “influential scientific information”, as well as prescribing standards of “transparency”. EPA policy states that information “disseminated in support of top Agency actions” will generally considered to be “influential”:

*6.3. EPA will generally consider the following classes of information to be influential, and, to the extent that they contain scientific, financial, or statistical information, that information should adhere to a rigorous standard of quality:*

*Information disseminated in support of top Agency actions (i.e., rules, substantive notices, policy documents, studies, guidance) that demand the ongoing involvement of the Administrator’s Office and extensive cross-Agency involvement; issues that have the potential to result in major cross-Agency or cross-media policies, are highly*

*controversial, or provide a significant opportunity to advance the Administrator's priorities. Top Agency actions usually have potentially great or widespread impacts on the private sector, the public or state, local or tribal governments. This category may also include precedent-setting or controversial scientific or economic issues.*

It is hard to contemplate actions that better fit these criteria than proceedings connected with the Endangerment Decision, including the denial of the petitions for reconsideration. Since the Myths vs Facts document was disseminated in support of a “top Agency action” fitting these criteria, it would appear to be “influential” scientific information under EPA Guidelines.

Under EPA (and OMB) policies, as “influential scientific information”, the Myths vs Facts document ought to have received external peer review, which, obviously, it did not receive.

Second, EPA policies also prescribe “transparency” for influential scientific information. Despite these transparency requirements, EPA heavily expurgated their FOIA production, asserting “deliberative and attorney-client privilege” (the latter only applicable to exchanges with the OGC). While this privilege does apply to many documents, transparency obligations for “influential scientific information” appear to supercede kneejerk assertion of “deliberative” privilege.”

The context and this newly recognized aspect of the proceeding and supporting documentation make plain that this information is of great import to ongoing public policy debates, and of public interest.

### **EPA Must Err on the Side of Disclosure**

It is well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, ““general philosophy of full agency

disclosure” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 3 (1965)). Accordingly, when an agency withholds requested documents, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the recent Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in my request to EPA to produce responsive documents.

*Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act... is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.”

### **Request for Fee Waiver**

This discussion is detailed as a result of our recent experience of agencies improperly using denial of fee waivers to impose an economic barrier to access, an improper means

of delaying or otherwise denying access to public records, despite our history of regularly obtaining fee waivers. We are not alone in this experience.<sup>4</sup>

**Disclosure would substantially contribute to the public at large's understanding of governmental operations or activities, on a matter of demonstrable public interest.**

CEI's principal request for waiver or reduction of all costs is pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) ("Documents shall be furnished without any charge... if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government and is not primarily in the commercial interest of the requester"); *see also* 40 C.F.R. §2.107(l), and (c).

CEI does not seek these records for a commercial purpose. Requester is organized and recognized by the Internal Revenue Service as 501(c)3 educational organizations. As such, requester also has no commercial interest possible in these records. If no commercial interest exists, an assessment of that non-existent interest is not required in any balancing test with the public's interest.

As a non-commercial requester, CEI is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*, 754 F. Supp. 2d 1 (D.D.C. Nov. 30, 2010).

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<sup>4</sup> See February 21, 2012 letter from public interest or transparency groups to four federal agencies requesting records regarding a newly developed pattern of fee waiver denials and imposition of "exorbitant fees" under FOIA as a barrier to access, available at <http://images.politico.com/global/2012/03/acluefffeewvrfoialtr.pdf>; *see also* *National Security Counselors v. CIA* (CV: 12-cv-00284(BAH), filed D.D.C Feb. 22, 2012); *see also* "Groups Protest CIA's Covert Attack on Public Access," *OpenTheGovernment.org*, February 23, 2012, <http://www.openthegovernment.org/node/3372>.

The public interest fee waiver provision “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F. 2d 1284, 2184 (9th Cir. 1987). The Requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

FOIA is aimed in large part at promoting active oversight roles of watchdog public advocacy groups. “The legislative history of the fee waiver provision reveals that it was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,’ in particular those from journalists, scholars and nonprofit public interest groups.” *Better Government Ass’n v. State*, 780 F.2d 86, 88-89 (D.C. Cir. 1986) (fee waiver intended to benefit public interest watchdogs), citing to *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D.Mass. 1984); S. COMM.

ON THE JUDICIARY, AMENDING the FOIA, S. REP. NO. 854, 93rd Cong., 2d Sess. 11-12 (1974)).<sup>5</sup>

“This is in keeping with the statute’s purpose, which is ‘to remove the roadblocks and technicalities which have been used by... agencies to deny waivers.’” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Educ.*, 593 F. Supp. 261, 268 (D.D.C. 2009), citing to *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th. Cir. 1987) (quoting 132 Cong. Rec. S16496 (Oct. 15, 1986) (statement of Sen. Leahy).

Requester’s ability -- as well as many nonprofit organizations, educational institutions and news media that will benefit from disclosure -- to utilize FOIA depends on their ability to obtain fee waivers. For this reason, “Congress explicitly recognized the importance and the difficulty of access to governmental documents for such typically under-funded organizations and individuals when it enacted the ‘public benefit’ test for FOIA fee waivers. This waiver provision was added to FOIA ‘in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and

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<sup>5</sup> This was grounded in the recognition that the two plaintiffs in that merged appeal were, like Requester, public interest non-profits that “rely heavily and frequently on FOIA and its fee waiver provision to conduct the investigations that are essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.” *Better Gov’t v. State*. They therefore, like Requester, “routinely make FOIA requests that potentially would not be made absent a fee waiver provision”, requiring the court to consider the “Congressional determination that such constraints should not impede the access to information for appellants such as these.” *Id.*

requests,' in a clear reference to requests from journalists, scholars and, most importantly for our purposes, nonprofit public interest groups. Congress made clear its intent that fees should not be utilized to discourage requests or to place obstacles in the way of such disclosure, forbidding the use of fees as “toll gates” on the public access road to information.”” *Better Gov't Ass'n v. Department of State*.

As the *Better Government* court also recognized, public interest groups employ FOIA for activities “essential to the performance of certain of their primary institutional activities -- publicizing governmental choices and highlighting possible abuses that otherwise might go undisputed and thus unchallenged. These investigations are the necessary prerequisites to the fundamental publicizing and mobilizing functions of these organizations. Access to information through FOIA is vital to their organizational missions.”

Congress enacted FOIA clearly intending that “fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.” *Ettlinger v. FBI*, citing Conf. Comm. Rep., H.R. Rep. No. 1380, 93d Cong., 2d Sess. 8 (1974) at 8. Improper refusal of fees as a means of withholding records from a FOIA requester constitutes improper withholding. *Ettlinger v. FBI*.

Therefore, “insofar as... [agency] guidelines and standards in question act to discourage FOIA requests and to impede access to information for precisely those groups Congress intended to aid by the fee waiver provision, they inflict a continuing hardship on the non-profit public interest groups who depend on FOIA to supply their lifeblood -- information.” *Better Gov't v. State* (internal citations omitted). The courts therefore will

not permit such application of FOIA requirements that “‘chill’ the ability and willingness of their organizations to engage in activity that is not only voluntary, but that Congress explicitly wished to encourage.” *Id.* As such, agency implementing regulations may not facially or in practice interpret FOIA’s fee waiver provision in a way creating a fee barrier for Requester.

Courts have noted FOIA’s legislative history to find that a fee waiver request is likely to pass muster “if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effects of agency policy or regulations on public health or safety; or, otherwise confirms or clarifies data on past or present operations of the government.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d at 1284-1286.

This information request meets that description, for reasons both obvious and specified.

**1) The subject matter of the requested records specifically concerns identifiable operations or activities of the government.** Potentially responsive records reflect the efforts that were or were not undertaken in producing a record(s) arguably reflecting highly influential scientific information, key to EPA’s most high-profile regulatory initiatives of recent years which continue to command public interest.

As EPA is aware, these policies have become the subject of substantial media interest, enormous public participation in EPA’s public comment process and congressional requests for explanation and information. Responsive records therefore

would contribute significantly to public understanding of the operations or activities of the government about which there is no other information in the public domain.

Release of these records also directly relates to high-level promises by the President of the United States and the Attorney General to be “the most transparent administration in history.”<sup>6</sup> This transparency promise, in its serial incarnations, demanded and spawned widespread media coverage, and then of the reality of the Administration’s transparency efforts, and numerous transparency-oriented groups reporting on this performance, prompting further media and public interest (*see, e.g.*, an internet search of “study Obama transparency”).

**This request, when satisfied, will further inform this ongoing public discussion and particularly the discussion of EPA’s proposed rules, and numerous other federal research programs which cite to or rely on EPA assertions on this issue, including its “Endangerment” finding.**

On its face, therefore, information shedding light on this record’s provenance satisfies FOIA’s test.

For the aforementioned reasons, potentially responsive records unquestionably reflect “identifiable operations or activities of the government” with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly concedes that this threshold is easily met. There can be no question that this is such a case.

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<sup>6</sup> Jonathan Easley, *Obama says his is ‘most transparent administration’ ever*, THE HILL, Feb. 14, 2013, <http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history>.

**2) Requester intends to broadly disseminate responsive information.** As demonstrated herein including in the litany of exemplars of newsworthy FOIA activity requester has generated with public information, and as EPA knows better than all others, requester has both the intent and the ability to convey any information obtained through this request to the public.

CEI and requesting counsel, particularly for his FOIA work, are regularly cited in newspapers and trade and political publications, and discusses his FOIA work and findings on widely heard and viewed electronic media, representing a practice of broadly disseminating public information obtained under FOIA, which practice requester intends to continue in the instant matter. As EPA is aware and as further established herein, this is an integral part of CEI's mission and operations.

**3) Disclosure is "likely to contribute" to an understanding of specific government operations or activities because the releasable material will be meaningfully informative in relation to the subject matter of the request.** Requester intends to broadly disseminate responsive information. The requested records contain information of significant and increasing public interest. This is not subject to reasonable dispute. Broadly disseminating information of great public interest and informative value requester assures it is "likely to contribute to an understanding of Federal government operations or activities."

However, **the Department of Justice's Freedom of Information Act Guide makes it clear that, in the DoJ's view, the "likely to contribute" determination hinges in substantial part on whether the requested documents provide information**

**that is not already in the public domain.** There is no reasonable claim to deny that, to the extent the requested information is available to any parties, this is information held only by EPA. It is therefore clear that the requested records are “likely to contribute” to an understanding of your agency's decisions because they are not otherwise accessible other than through a FOIA request.

Further, given the tremendous media interest generated to date in EPA’s proposals known as the “war on coal”, the notion that disclosure will not significantly inform the public at large about operations or activities of government is facially absurd.

Thus, disclosure and dissemination of this information will facilitate meaningful public participation in the policy debate, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of your agency's dealings in developing what are de facto and appear to be de jure highly influential scientific information for the public.

**4) The disclosure will contribute to the understanding of the public at large, as opposed to the understanding of the requester or a narrow segment of interested persons.** Requester has an established practice of utilizing FOIA to educate the public, lawmakers, and news media about the government’s operations and, in particular and as illustrated in detail above, have brought to light important information about policies grounded in energy and environmental policy.

CEI is dedicated to and has a documented record of promoting the public interest, advocating sensible policies to protect human health and the environment, broadly disseminating public information, and routinely receiving fee waivers under FOIA.

With a demonstrated interest and fast-growing reputation for and record in the relevant policy debates and expertise in the subject of energy- and environment-related regulatory policies, CEI unquestionably has the “specialized knowledge” and “ability and intention” to disseminate the information requested in the broad manner, and to do so in a manner that contributes to the understanding of the “public-at-large.”

**5) The disclosure will contribute “significantly” to public understanding of government operations or activities.** *We repeat and incorporate here by reference the arguments above from the discussion of how disclosure is “likely to contribute” to an understanding of specific government operations or activities.*

As previously explained, the public has no source of information on this issue of the provenance of the above-described records to which EPA points as supporting possibly its most controversial, and most impactful, decision and regulatory initiatives in its history.

Because there is no such information or any such analysis in existence, any increase in public understanding of this issue is a significant contribution to this increasingly important issue as regards the operation and function of government.

Because CEI has no commercial interests of any kind, disclosure can only result in serving the needs of the public interest.

**As such**, requester has stated “with reasonable specificity that their request pertains to operations of the government,” that they intend to broadly disseminate responsive records. “[T]he informative value of a request depends not on there being certainty of what the documents will reveal, but rather on the requesting party having

explained with reasonable specificity how those documents would increase public knowledge of the functions of government.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health and Human Services*, 481 F. Supp. 2d 99, 107-109 (D.D.C. 2006).

We expect EPA, in the event it is tempted to again deny our fee waiver, examine the requests which — when under scrutiny for the practice — EPA serially characterized as “not billable,” even where the requests implicated search and processing activity requiring substantially more than two hours’ time.<sup>7</sup> We believe the Agency will see that the processing time required for this request is comparable to or less than some of those substantial requests.

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<sup>7</sup> See, EPA-HQ-2013-009249, EPA-HQ-2013-009235, EPA-HQ-2013-008908, EPA-HQ-2013-008015, EPA-HQ-2013-006937, EPA-HQ-2013-006939, EPA-HQ-2013-006588, EPA-EPA-HQ-2013-005618, HQ-2013-006005, EPA-HQ-2013-004176 (the “fee waiver” FOIA), EPA-HQ-2014-000356, EPA-R8-2014-000358. EPA adopted this new practice on April 19, 2013.

Finally, we note that EPA has waived requester CEI's fees for substantial productions arising from requests expressing the same intention, even using the same language as used in the instant request.<sup>8</sup> This is also true of other federal agencies.<sup>9</sup>

For all of these reasons, CEI's fees should be waived in the instant matter.

2) **Alternately, CEI qualifies as a media organization for purposes of fee waiver**

The provisions for determining whether a requesting party is a representative of the news media, and the "significant public interest" provision, are not mutually exclusive. Again, as CEI is a non-commercial requester, it is entitled to liberal construction of the fee waiver standards. 5 U.S.C.S. § 552(a)(4)(A)(iii), *Perkins v. U.S. Department of Veterans Affairs*. Alternately and only in the event EPA refuses to waive our fees under the "significant public interest" test, which we will then appeal while requesting EPA proceed with processing on the grounds that we are a media organization, we request a waiver or

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<sup>8</sup> See, e.g., no fees required by EPA for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language (CEI): EPA-HQ-2013-000606, HQ-FOI-01087-12, EPA-HQ-2013-001343, EPA-R6-2013-00361, EPA-R6-2013-00362, EPA-R6-2013-00363, HQ-FOI-01312-10, R9-2013-007631, HQ-FOI-01268-12, HQ-FOI-01269, HQ-FOI-01270-12. These examples involve EPA either waiving fees, not addressing the fee issue, or denying fee waiver but dropping that posture when requester sued.

<sup>9</sup> See, e.g., no fees required by other agencies for processing often substantial numbers of records on the same or nearly the same but less robust waiver-request language include: **DoI** OS-2012-00113, OS-2012-00124, OS-2012-00172, FWS-2012-00380, BLM-2014-00004, BLM-2012-016, BLM: EFTS 2012-00264, CASO 2012-00278, NVSO 2012-00277; **NOAA** 2013-001089, 2013-000297, 2013-000298, 2010-0199, and "Peterson-Stocker letter" FOIA (August 6, 2012 request, no tracking number assigned, records produced); **DoL** (689053, 689056, 691856 (all from 2012)); **FERC** 14-10; **DoE** HQ-2010-01442-F, 2010-00825-F, HQ-2011-01846, HQ-2012-00351-F, HQ-2014-00161-F, HQ-2010-0096-F, GO-09-060, GO-12-185, HQ-2012-00707-F; **NSF** (10-141); **OSTP** 12-21, 12-43, 12-45, 14-02.

limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii) (“fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by.... a representative of the news media...”) and 40 C.F.R. §2.107(d)(1) (“No search or review fees will be charged for requests by educational institutions...or representatives of the news media.”).

However, we note that as documents are requested and most certainly available electronically in their original format, and regardless can easily be moved to a disc or flash drive, or simply emailed, there are no copying costs.

Requester’s publishing practices are well-known to EPA,<sup>10</sup> as are its reach and intentions to broadly disseminate, all in fulfillment of CEI’s mission, set forth *supra*.

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<sup>10</sup> For a small, print-only sampling, see e.g., Stephen Dinan, *Do Text Messages from Feds Belong on Record? EPA’s Chief’s Case Opens Legal Battle*, THE WASHINGTON TIMES, Apr. 30, 2011, at A1. Other outlets covering this dissemination include Peter Foster, *More Good News for Keystone*, NATIONAL POST, Jan. 9, 2013, at 11; Juliet Eilperin, *EPA IG Audits Jackson’s Private E-mail Account*, THE WASHINGTON POST, Dec. 19, 2013, at A6; James Gill, *From the Same Town, But Universes Apart*, THE NEW ORLEANS TIMES-PICAYUNE, Jan. 2, 2013, at B1; Kyle Smith, *Hide & Sneak*, THE NEW YORK POST, Jan. 6, 2013, at 23. See also, Stephen Dinan, *EPA Staff to Retrain on Open Records; Memo Suggests Breach of Policy*, THE WASHINGTON TIMES, Apr. 9, 2013, at A4; Stephen Dinan, *Suit Says EPA Balks at Release of Records; Seeks Evidence of Hidden Messages*, THE WASHINGTON TIMES, Apr. 2, 2013, at A1, Stephen Dinan, “Researcher: NASA hiding climate data”, *Washington Times*, Dec. 3, 2009, at A1, Dawn Reeves, *EPA Emails Reveal Push To End State Air Group’s Contract Over Conflict*, INSIDE EPA, Aug. 14, 2013. See also Stephen Dinan, [\*EPA’s use of secret email addresses was widespread: report\*](#), THE WASHINGTON TIMES, Feb. 13, 2014; see also, Christopher C. Horner, *EPA administrators invent excuses to avoid transparency*, THE WASHINGTON EXAMINER, Nov. 25, 2012, <http://washingtonexaminer.com/epa-administrators-invent-excuses-to-avoid-transparency/article/2514301#.ULOaPYf7L9U>; see also Christopher C. Horner, *EPA Circles Wagons in ‘Richard Windsor’ Email Scandal*, BREITBART, Jan. 16, 2013, <http://www.breitbart.com/Big-Government/2013/01/16/What-s-in-a-Name-EPA-Goes-Full-Bunker-in-Richard-Windsor-EMail-Scandal>. See also, *100 People to Watch this Fall*, THE HILL, Aug. 7, 2013, <http://thehill.com/business-a-lobbying/315837-100-people-to-watch-this-fall-?start=7>.

Also, the federal government has already acknowledged that CEI qualifies as a media organization under FOIA.<sup>11</sup>

The key to “media” fee waiver is whether a group publishes, as CEI most surely does. *See supra*. In *National Security Archive v. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), the D.C. Circuit wrote:

The relevant legislative history is simple to state: because one of the purposes of FIRA is to encourage the dissemination of information in Government files, as Senator Leahy (a sponsor) said: “It is critical that the phrase ‘representative of the news media’ be broadly interpreted if the act is to work as expected.... If fact, *any person or organization which regularly publishes or disseminates information to the public ... should qualify for waivers as a ‘representative of the news media.’*”

*Id.* at 1385-86 (emphasis in original).

As the court in *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) noted, this test is met not only by outlets in the business of publishing such as newspapers; instead, citing to the *National Security Archives* court, it noted one key fact is determinative, the “*plan to act, in essence, as a publisher*, both in print and other media.” *EPIC v. DOD*, 241 F.Supp.2d at 10 (*emphases added*). “In short, the court of appeals in *National Security Archive* held that ‘[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into a distinct work, and distributes that work to an audience.’” *Id.* at 11. *See also, Media Access Project v. FCC*, 883 F.2d 1063, 1065 (D.C. Cir. 1989).

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<sup>11</sup> *See e.g.*, Treasury FOIA Nos. 2012-08-053, 2012-08-054.

For these reasons, CEI plainly qualifies as a “representative of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public.

The information is of critical importance to the nonprofit policy advocacy groups engaged on these relevant issues, news media covering the issues, and others concerned with EPA activities in this controversial area, or as the Supreme Court once noted, what their government is up to.

For these reasons, requester qualifies as a “representative[] of the news media” under the statutory definition, because it routinely gathers information of interest to the public, uses editorial skills to turn it into distinct work, and distributes that work to the public. *See Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003)(non-profit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that non-profit requesters who are not traditional news media outlets can qualify as representatives of the new media for purposes of the FOIA, including after the 2007 amendments to FOIA. *See ACLU of Washington v. U.S. Dep’t of Justice*, No. C09-0642RSL, 2011, 2011 U.S. Dist. LEXIS 26047 at \*32 (W.D. Wash. Mar. 10, 2011). *See also Serv. Women’s Action Network v. DOD*, 2012 U.S. Dist. Lexis 45292 (D. Conn., Mar. 30, 2012).

Accordingly, any fees charged must be limited to duplication costs. The records requested are available electronically and are requested in electronic format, so there should be no costs.

## **Conclusion**

We expect EPA to release within the statutory period of time all segregable portions of responsive records containing properly exempt information, and to provide information that may be withheld under FOIA's discretionary provisions and otherwise proceed with a bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears).

We request EPA provide particularized assurance that it is reviewing some quantity of records with an eye toward production on some estimated schedule, so as to establish some reasonable belief that it is processing our request. 5 U.S.C.A. § 552(a)(6)(A)(i). EPA must at least inform us of the scope of potentially responsive records, including the scope of the records it plans to produce and the scope of documents that it plans to withhold under any FOIA exemptions; FOIA specifically requires EPA to immediately notify CEI with a particularized and substantive determination, and of its determination and its reasoning, as well as CEI's right to appeal; further, FOIA's unusual

circumstances safety valve to extend time to make a determination, and its exceptional circumstances safety valve providing additional time for a diligent agency to complete its review of records, indicate that responsive documents must be collected, examined, and reviewed in order to constitute a determination. *See Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 186 (D.C. Cir. 2013). See also; *Muttitt v. U.S. Central Command*, 813 F. Supp. 2d 221; 2011 U.S. Dist. LEXIS 110396 at \*14 (D.D.C. Sept. 28, 2011)(addressing “the statutory requirement that [agencies] provide estimated dates of completion”).

We request a rolling production of records, such that the agency furnishes records to my attention as soon as they are identified, preferably electronically, but as needed then to my attention, at the address below. We inform EPA of our intention to protect our appellate rights on this matter at the earliest date should EPA not comply with FOIA per, *e.g.*, *CREW v. FEC*.

If you have any questions please do not hesitate to contact me. I look forward to your timely response.

Sincerely,

A handwritten signature in dark ink, appearing to read 'C. Horner', with a stylized flourish extending to the right.

Christopher C. Horner  
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